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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No. 82-1765

KERNS BAKERY, INC., - - - - **Petitioner,**

versus

**KENTUCKY COMMISSION ON HUMAN
RIGHTS and
FRANK GOINS,** - - -

Respondents

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY**

BRIEF FOR RESPONDENTS IN OPPOSITION

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**KENTUCKY COMMISSION ON HUMAN
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**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY**

The Respondents, Kentucky Commission on Human Rights (hereinafter referred to as "Commission") and Frank Goins (hereinafter referred to as "Goins"), oppose the Petition for a Writ of Certiorari to review the opinion and judgment of the Court of Appeals of Kentucky decided October 8, 1982, and the final order of the Supreme Court of Kentucky denying discretionary review of February 9, 1983.

OPINION BELOW

The judgment and opinion of the Court of Appeals of Kentucky is reported at Ky. App., 644 S.W.2d 350.

CONSTITUTIONAL PROVISION AND STATE STATUTE INVOLVED

United States Constitution, First Amendment:

"Congress shall make no law respecting, an establishment of religion or prohibiting the free exercise thereof,..."

The state statute involved is the Kentucky Civil Rights Act, Ky. Rev. Stat. 344, and more specifically two sections, Ky.

Rev. Stat. § 344.040(1) which provides:

"It is an unlawful practice for an employer to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex or age between forty (40) and seventy (70)..."

and Ky. Rev. Stat. § 344.030(5) which provides:

"'Religion' means all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case, while succinct, does omit a few relevant facts. Goins had, prior to his discharge for

missing scheduled Sunday work, been considered a good worker. Goins' only reason for failing to work on Sunday was because his sincerely held religious belief prohibited him from working on his Sabbath.

Prior to missing this Sunday scheduled work, Goins had advised his supervisors of the religious-based conflict, sought accommodation, and made efforts to achieve an accommodation. Petitioner, Kerns Bakery, Inc., made no efforts to accommodate Goins, insisted that he work on his Sabbath, and discharged him when he refused.

Following his discharge, Goins filed a complaint with the Commission alleging that his rights under state law (Kentucky Civil Rights Act) had been violated by Petitioner. An administrative hearing was held and a Finding of Facts, Conclusions of Law and Order was entered. This document is reprinted in Appendix A, pp. 10-14. Petitioner appealed this decision to Laurel Circuit Court. This state circuit court upheld the Commission's findings that Petitioner could have accommodated Goins without undue hardship to the conduct of its business, but reversed on the sole grounds that the accommodation requirement was invalid because it conflicted with the Establishment Clause of the First Amendment to the Constitution of the United States and Section 5 of the Kentucky Constitution.

Respondents appealed this ruling of unconstitutionality. Petitioner did not cross-appeal the ruling that Goins could have been accommodated without undue hardship. The single issue before the Kentucky Court of Appeals, then, was the issue of constitutionality. That Court reversed the appellate decision of the Laurel Circuit Court and reinstated the Commission's Order.

REASONS FOR DENYING THE WRIT

I.

There Is No Federal Statute Nor Issue Of Reasonable Accommodation Before This Court.

Although Petitioner carefully constructs its "Question Presented" to invoke consideration by this Court of the factual issue of reasonable accommodation under the pertinent provisions of Title VII, 42 U.S.C. § 2000e, et. seq., (the federal Civil Rights Act of 1964) this is not an appeal of a decision that a federal statute has been violated. The complaint was brought under state statute, the Kentucky Civil Rights Act (Ky. Rev. Stat. 344) and Petitioner was found to have violated state, not federal, law. For this Court to review the question presented by Petitioner it would have been necessary for Goins to have filed a charge with the U.S. Equal Employment Opportunity Commission, submitted to an investigation by the U.S. Equal Employment Opportunity Commission, filed a law suit against Petitioner in federal district court, won a favorable decision, and survived an appeal in the U.S. Court of Appeals for the Sixth Circuit. None of this was done.

Petitioner is attempting, with this Petition, to by-pass these necessary prerequisites to review and bootstrap itself into a review of the accommodation issue by an artful, albeit inaccurate, statement of the "Question Presented."

Assuming for the sake of argument that Petitioner is entitled to a review by this Court, it cannot possibly be on the issue of accommodation, because Petitioner never appealed the adverse ruling of the Laurel Circuit Court. That court held that Petitioner's challenge was "without merit." (Petitioner's Appendix p. 22). In explaining, the court said:

"Substantial evidence was presented to the Commission that Kerns could have accommodated Goins' religious

belief and practice without undue hardship on the conduct of its business. With relatively minor inconvenience, one of the 'breakmen' could have been assigned to Goins' position on Sunday, or Goins could have been assigned a sanitation job which was available at the time, or he could have been transferred to a maintenance job, neither of which required work on Sunday. Suffice it to say that Kerns made little effort to accommodate Goins. The manager of Kerns was not even made aware of the problem before Goins was discharged and did not learn about the problem until Goins filed his complaint with the Commission." (Petitioner's Appendix pp. 22-23).

When Respondents appealed the opinion of the Laurel Circuit Court that the state law was unconstitutional, Petitioner could have cross-appealed the Laurel Circuit Court's opinion that Kerns could have accommodated Goins. However, Petitioner stood silent, and should not now be allowed to retrieve and revive its previously discarded argument.

II.

The Accommodation Provision Of The Kentucky Civil Rights Act Is Constitutional.

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This Court has frequently grappled with the tensions existing between the Free Exercise Clause and the Establishment Clause. The effort of the Court has been to find a neutral course between the two clauses, "both of which are cast in absolute terms, and either of which, if expanded to a logical extreme would tend to clash with the other." *Walz v. Tax Commissioner*, 397 U.S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

In *Committee for Public Education v. Nyquist*, 413 U.S.

756, 772 (1973) this Court in reviewing its previous decisions outlined its standards:

"Taken together, these decisions dictate that to pass muster under the Establishment Clause the law in question, first must reflect a clearly secular legislative purpose, e.g., *Epperson v. Arkansas*, 393 U.S. 97, (1968); second, must have a primary effect that neither advances nor inhibits religion, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); and, third, must avoid excessive government entanglement with religion, e.g., *Walz v. Tax Commissioner*, *supra*.

The pertinent sections of the Kentucky Civil Rights Act, Ky. Rev. Stat. § 344.040 and § 030(5) meet these tests and are fully consistent with the First Amendment. As stated by the Kentucky Court of Appeals:

"The secular purpose of the accommodation statute is to remove a barrier allowing discrimination in employment and to eliminate the situation where an employee is forced to abandon 'one of the precepts of his religion in order to accept work...' *Sherbert v. Verner*, 374 U.S. 398 (1963). By adopting this statute, the Legislature merely promotes equal employment opportunities for members of all religious faiths." *Kentucky Commission on Human Rights v. Kerns Bakery, Inc.*, 644 S.W.2d 350, 353 (1982).

The primary effect of this provision neither advances nor inhibits religion. This provision does not promote, sponsor, support, or involve the state in a religious activity. Its primary effect accrues to individuals and not to any religious organization. Any benefit which a particular religious organization might derive from this provision is so remote as to be inconsequential.

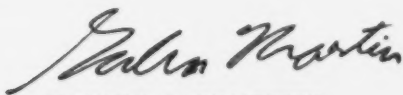
This provision does not involve the state in an excessive entanglement in religion. "The Legislature's interest here in

religion is only for the purpose of outlawing religious discrimination in employment." *Kerns, Id.*, at 353. Further, the provision does not fabricate a remedy for every possible religious conflict, nor does it require that all such possible conflicts be accommodated. Rather, it directs the employer to treat each situation individually and accommodate the employee "only if he can 'reasonably' do so 'without undue hardship on the conduct of the employer's business.' K.R.S. 344.030(5)." *Kerns, supra.*, 353. (emphasis in original).

CONCLUSION

For the foregoing reasons, Respondents, Kentucky Commission on Human Rights and Frank Goins submit that the Petition for a Writ of Certorari should be denied.

Respectfully submitted,



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May 27, 1983

PROOF OF SERVICE

I, Galen A. Martin, the counsel for the Respondents, hereby certify that three (3) copies of the foregoing Brief For Respondents In Opposition were mailed, via First Class Mail, postage prepaid, to Honorable Boyd F. Taylor, TAYLOR & JENSEN, P.O. Box 905, London, Kentucky 40741, Counsel for Petitioner, this 27 day of May, 1983.



GALEN A. MARTIN

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COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY COMMISSION ON HUMAN RIGHTS
Complaint No. 1365-E

IN THE MATTER OF)
KERN'S BAKERY) **FINDINGS OF FACT**
) **CONCLUSIONS OF LAW**
) **ORDER**

The Kentucky Commission on Human Rights, having held a one-day public hearing in the above-captioned matter on May 19, 1980, in London, Laurel County, Kentucky, and having reviewed the transcript of the hearing and all exhibits filed herein, and having considered the briefs filed by counsel, and having carefully weighed the arguments of all parties, makes and adopts the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Kern's Bakery (hereinafter referred to as Respondent) operates a commercial wholesale bakery in London, Kentucky. Its operation is divided into several departments and includes a department known as the production and sanitation department. There are approximately 100 persons employed in this one department.

2. Frank Goins (hereinafter referred to as Complainant) was employed by the Respondent in the production and sanitation department from July 16, 1976 until May 28, 1979. At all relevant times herein, Complainant held the position of roll oven operator on the second shift.

3. In January 1979, the Complainant began attending religious services at the East 80 Free Pentecostal Holiness Church. He was "saved" on March 17, 1979 and was baptized on April 14, 1979.

4. It is the sincere religious belief of the membership and minister of East 80 Free Pentecostal Holiness Church that Sunday is the Sabbath and that on the Sabbath no person should engage in ordinary work for pay. Complainant has since his baptismal held the same sincere religious belief that he should refrain from work on Sunday.

5. Almost all of the employees of Respondent's production and sanitation department are regularly scheduled to work on Sundays as a part of the five-day work week. The department does not normally work on Tuesdays and Saturdays. This work week is common in the commercial wholesale bakery industry.

6. In May 1979, Complainant advised of Respondent's supervisory personnel of his religious belief against Sunday work.

7. Respondent made no efforts to accommodate the Complainant's religious-based need to be absent from work on Sundays.

8. Complainant was discharged from his employment on May 28, 1979, because he refused to work on Sunday, and because for religious purposes and belief he failed to report for work on the following Sundays: May 6, 1979, May 20, 1979 and May 27, 1979.

9. Complainant filed a written sworn complaint with the Commission on November 9, 1979, claiming that he was aggrieved by an unlawful practice with regard to his discharge by Respondent.

10. Respondent employees at its London, Kentucky, facility are not unionized and are not subject to nor derive any rights from the terms of any collective bargaining agreement.

11. Respondent failed or refused to exercise the available option of offering Complainant to the temporary painter's helper job which was vacant and did not require Sunday work.

The temporary painter's helper job was filled on May 23, 1979, and ended on December 14, 1979.

12. As a result of Respondent's failure to accommodate the Complainant, the Complainant was discharged from his employment as a roll oven operator. Complainant suffered damages in the form of lost wages and lost benefits accruing from the date of Complainant's discharge.

13. Following his discharge Complainant made numerous and repeated efforts to obtain other employment.

CONCLUSIONS OF LAW

1. The Kern's Bakery is an "employer" as defined KRS 344.030 (1).

2. Frank Goins is an "individual claiming to be aggrieved by an unlawful practice" under KRS 344.200 (1).

3. Frank Goins was discharged from his employment with Kern's Bakery because he refused, as a matter of religious observance, practice, and belief, to work on Sundays.

4. The Kern's Bakery could have reasonably accommodated Mr. Goins' religious practice prohibiting Sunday work without undue hardship on the conduct of the company's business by reassigning him or excusing him and assigning substitutes to work in his place. This accommodation was required according to the standards imposed under the case of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979); and *Kentucky Commission on Human Rights v. Commonwealth of Kentucky, Department for Human Resources, Hazelwood Hospital*, Ky. App., 564 S.W. 2d 38 (1978). This accommodation would not have violated a union contract or seniority agreement, and would not have imposed any cost above *de minimus*.

5. It was the duty of Kern's Bakery to make reasonable effort to accommodate Complainant's religious practices and they made no such effort and the failure to make such effort is a violation of KRS 344.040 and KRS 344.030(5).

6. As a direct and proximate result of Respondent's failure to accommodate Frank Goins, he suffered damages in the following extent and manner, to-wit:

A. Mr. Goins was discharged from his employment as a roll oven operator.

B. Mr. Goins suffered a loss of seniority and other employee benefits.

C. Mr. Goins suffered monetary damages in the form of lost wages.

ORDER

IT IS THEREFORE ORDERED that Respondent:

1. Immediately cease and desist its unlawful practice of religious discrimination.

2. Immediately reinstate Complainant, Frank Goins, to a position at Kern's Bakery, and restore Complainant's seniority and employee benefits.

3. Pay to Complainant, Frank Goins, an amount equal to all gross wages Complainant would have earned from May 28, 1979, to his date of reinstatement. This amount shall be diminished by appropriate state and federal taxes and by all interim earnings. The parties shall submit to the Commission within thirty (30) days a proposed supplementary order setting forth the amount of wages to be paid Complainant which shall reflect the manner of calculation and all proposed deductions.

4. Respondent shall henceforth accommodate the Complainant's desire for religious reasons, to be excused from Sunday work. This provision shall remain in effect for so long as the Complainant remains employed at Kern's Bakery or un-

til the Respondent demonstrates to the Commission, upon appropriate motion, that due to changed circumstances, said accommodation imposes an undue hardship on the conduct of Respondent's business.

5. Report the manner of compliance within thirty (30) days of this Order.

THIS THE 10 DAY OF SEPT., 1980.

(s) _____
Edmund P. Karem
Chairperson
Kentucky Commission on Human Rights